No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association, T. M. DELANEY, individually and as General Chairman, LEO HOLZACHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairmen,

Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington corporation, OREGON TRUNK RAILWAY, a Washington Corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation,

Appellees.

REPLY BRIEF FOR APPELLANTS' ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL.

Appeal from the United States District Court for the District of Oregon

CLIFFORD D. O'BRIEN
514 Corbett Building, Portland, Oregon 97204
HARRY J. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 12-65

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The court below granted the preliminary injunction on one ground only, namely, that the dispute involved in the strike was a serious dispute which is properly referable to an adjustment board (R. 115). Appellees in their brief do not meet this issue as analyzed in appellants' brief. They ignore the obvious fact that appellants were trying to get an agreement creating as to the fu-

ture the right to an air conditioned room, a new Simmons 400 mattress, and calls to wake the away from home employee, which was an entirely different dispute from the question appellees attempted to submit to the adjustment boards, namely, whether the list of facilities contained in the carriers' July 25, 1964 notice complied with past contractual obligations to furnish suitable accommodations. Instead of facing this issue, appellees raise new issues, trying to make it appear that appellants' August 3, 1964 notice was barred by some moratorium or no strike agreement (Appellees' Br., pp. 28-29), or by some agreement to arbitrate the issue of the contractual provision to be made for expenses away from home (Appellees' Br., p. 24), or that mediation procedures had not been exhausted (Appellees' Br., pp. 14, 22-23, 26-27, 29-30), or that the strike threatened would violate the status quo agreement of September 15, 1964 (Appellees' Br. p. 8).

The complaint sought an injunction on only one ground, that the threatened strike was over a minor dispute (R. 10). The court below granted the injunction on this basis only. The new issues are not properly before this Court. They were not raised below nor was any cross appeal taken by appellees. Upon the record now before this Court the injunction issued below cannot properly be affirmed on any of the suggested bases.

I

The White House National Work Rules Agreement did not bind the parties for a term as to any issue except rates for miles in excess of the basic day.

Appellees in their brief attempt to bring the issue of expenses away from home into some assumed no strike provision allegedly applicable to the national settlement of the notices of November 1959 and September 1960. Appellees repeatedly state that the issue of expenses away from home was handled by each side on a national basis beginning with the original 1959 and 1960 notices and continuing down through the White House Agreement of June 25, 1964 (Appellees' Br., pp. 3-4, 28-29). Appellees conclude that "it is unthinkable that this dispute, which is an integral part of the national handling of all disputes in a non-strike basis, could suddenly become a strikable issue." (Appellees' Br., p. 29).

This conclusion of appellees is without any foundation in fact or in law. The White House National Work Rules Agreement of June 25, 1964, expressly left all parties free, except as to rates for miles in excess of the basic day, to propose changes therein immediately and to strike to bring about such changes once the usual procedures of the Railway Labor Act for changing or modifying agreements had been followed. Thus Article VIII "Effect of This Agreement" (Plffs' Exh. 6) twice expressly provides that the agreement, except as to rates for miles in excess of the basic day, is to remain in effect only until changed or modified in accordance with the provisions of the Railway Labor Act. In other words,

the agreement was not for any specified term. The parties could the next day after signing it give notice of the desire to negotiate a change.

One other carrier unsuccessfully tried to convince the courts that somehow any issue involved in the national handling which resulted in S. Joint Resolution 102, 77 Stat. 132, and the White House Settlement somehow ceased to be the proper subject for a Section 6 notice enforced by strikes. *Order of Railway Conductors and Brakemen* v. *Louisville & Nashville R. Co.* (5 Cir. 1964), 331 F.2d 368, 369-370. The United States Court of Appeals for the Fifth Circuit, in refusing to enjoin a strike, very properly pointed out that S. Joint Resolution 102, 77 Stat. 132, expired February 28, 1964 and hence its no strike provisions, if applicable, would have no force and effect after that date, except as to matters included in the Arbitration Award of Board No. 282. Here, of course, there is no contention that expenses away from home were included in the issues submitted to Board 282 or within its award.

From the foregoing it is evident that neither by agreement nor by law, is there any moratorium or no strike provision applicable to prevent appellants from striking to secure as accommodations for employees when away from home a new Simmons 400 mattress and calls to wake them, or $6.00 allowance per trip in lieu thereof.

II

The White House National Work Rules Agreement did not provide for compulsory arbitration of the contractual provisions to be entered into on a local basis between an individual carrier and a union with respect to the provision to be made for employees' expenses away from home.

The appellees take the view that the White House National Work Rules Settlement bound each individual carrier and each union to arbitrate what contractual provisions should be made for expenses away from home, in the event they could not reach an agreement with respect thereto. Appellees state (Br. p. 24):

> "If agreement could not be reached, the 'White House' solution itself provided for the arbitral process as its substitute—"

The trial court made no such finding and we respectfully submit that there is nothing in the White House National Work Rules Agreement which supports such a construction. Article II of the White House National Work Rules Agreement (Plffs'. Exh. 6) provides with respect to "Expenses Away from Home," in Section 1 thereof, that:

> "Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis."

Counsel for appellee in his opening statement in the court below properly recognized that the quoted sentence contemplated that each carrier would negotiate on a local basis a contractual obligation specifying the

lodging to be furnished or the dollars and cents to be paid instead. Counsel for appellees stated (Tr. 8):

> "Obviously, when any matter of that kind is being settled on a national basis, it isn't possible to dictate what is going to be suitable lodging or an equitable allowance in lieu thereof. So the agreement entered into at the White House's compulsion also provided that this—what was suitable lodging or an equitable allowance in lieu thereof should go back to the various carriers and the organizatons for negotiation."

Nowhere in the agreement is there any provision for determining by the "arbitral process" (Appellees' Br. p. 24) what the contractual obligations of any carrier or any union shall be with respect to the specific type of lodgings to be furnished or the dollars and cents to be paid as an allowance in lieu thereof. Nor is there any evidence that arbitration of this issue was ever contemplated.

Appellees' attempt to create an obligation to arbitrate the contractual provision to govern expenses away from home out of the statement in Article VII that "Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act." (Plffs'. Exh. 6). This provision adds nothing. Without this provision, by reason of Section 3 of the Railway Labor Act, 45th S.C.A. 153, all disputes involving the interpretation or application of any collective bargaining

agreement entered into by railway carriers with unions are referable to adjustment boards. There is nothing in this provision which even suggests that its scope is broader than the usual grievance jurisdiction traditionally handled by adjustment boards in the railroad industry. Nothing in this provision suggests that the parties were agreeing to arbitrate the making of new contractual obligations looking to the future.

Both in the railroad field and in the non railway field the distinction between the resolution of grievances and the negotiation of new contractural terms is well established. Arbitration is the generally approved method of resolving grievances but it is so rarely used for the creation of new contract terms as to negative the validity of any assumption arbitration of new contractual terms was intended From appellees' presentation the Court is invited to infer that the adjustment board provision in the contract has reference to the expenses away from home provision. An examination of the whole contract negatives such an inference. Article VII, referring to board of adjustment procedure, was obviously drafted for the purpose of providing adjustment board procedures to deal with questions arising under the literally hundreds of other contractual obligations contained in the same contract. Thus the White House National Work Rules Agreement contains pages of detailed provisions with respect to the manner in which employees are to receive pay for holidays, the manning of self-propelled machines, the pay structure for road and yard service and the use of combination road-yard service. There is no basis for inferring that adjustment board

provisions in the contract were put there as a method of arbitrating the expenses away from home questions.

Article VII, providing for adjustment board resolution of issues of interpretation and application, would apply to Article II only if there were some issue of interpretation or application of the contractual terms already adopted by the parties. It is not a provision for the resolution by arbitration of the contractual provisions to be adopted by the parties. The agreement by providing for working out on a local basis recognizes that contractual provisions must be worked out by the parties to define the extent of the obligation in terms of specific accommodations and specific sums to be paid in lieu.

III

The parties are free to strike to secure a contractual provision establishing conditions of employment or compensation whenever the National Mediation Board is not engaged in mediation of the dispute and ten days have elapsed since the termination of conferences.

Section 6 of the Railway Labor Act, 45 U.S.C.A. 156, quoted in full at page 22 of our main brief, limits the right to strike only for the periods in which negotiation or mediation is taking place, and ten days thereafter. Here more than ten days had elapsed since the last conferences. The National Mediation Board neither proffered its services nor were the Board's services requested by the carrier.

It is true that the mediatory services of the National

Mediation Board were requested by the union. The Mediation Board failed to docket the case and at no time mediated the dispute (Tr. 13). The inaction of the National Mediation Board cannot serve to deprive the union of its right to strike in support of its contract proposals. The union had done everything within its power to comply with all the provisions of the Railway Labor Act.

If the unions had never requested the National Mediation Board to mediate, the union would be free to strike just as the carrier is free under the provisions of Section 6 to alter its rates of pay, rules, or working conditions when a "period of ten days has elapsed after termination of conferences without a request for or a proffer of the services of the Mediation Board." Where the Mediation Board fails to provide its mediation services, a party should be no worse off for having requested such services than he would have been had he not requested the services.

CONCLUSION

We believe all the other contentions raised by the appellees in their brief, to the extent they are properly before this Court, are fully answered by what we have already stated in our main brief and do not merit further reply.

The court below decided the case upon the sole issue that a minor dispute only was involved. But the documentary evidence establishes that the appellants sought to strike to secure a contractual provision specifying

the facilities be provided employees away from home for the future. This was clearly a major dispute and hence appellants were entitled to exercise their self help powers including the right to strike without being enjoined therefrom by the courts.

Respectfully submitted,

CLIFFORD D. O'BRIEN
514 Corbett Building,
Portland, Oregon 97204

HARRY J. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa

Attorneys for Appellants

Portland, Oregon
December 1, 1965

CERTIFICATE OF COUNSEL

I, Clifford D. O'Brien, one of the attorneys for Appellants, hereby certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

CLIFFORD D. O'BRIEN